Rakyat Corp Sdn Bhd v Abd Naeeim bin Tarmiji

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–312 OF 2006
MOHD SOFIAN J
24 APRIL 2008

Land law — Restraint on dealings — Caveat — Private caveats — Application for removal of — Whether defendant had caveatable interest — Whether evidence supported existence of caveatable interest — Whether defendant's claim to caveatable interest raises serious issue to be tried — National Land Code ss 323, 327

On 21 March 2001, the defendant/purchaser entered into a sale and purchase agreement ('SPA') to purchase the land held under HS(D) 470/1985, Plot 468, Mukim Mergong, Kedah together with the house erected thereon ('the land') from the plaintiff/vendor. According to the SPA, the purchase price for the land was RM80,000 subject to the terms and conditions stipulated therein. The defendant paid the plaintiff RM16,000 as part payment of the purchase price and obtained end-financing to pay the balance of the purchase price. However the end-financing from the bank was only for the sum of RM52,000, leaving a balance of RM12,000, being the difference between the purchase and the loan amount. In addition, according to the Third Schedule of the SPA on instalments, the defendant had to pay the sum of RM12,000 to the plaintiff before the bank released the loan amount of RM52,000. Despite several reminders, the defendant failed to make the progress payments. The defendant had also failed to settle the RM12,000, despite receiving notices to settle the same. On 26 September 2001, the plaintiff sent the defendant a notice of claim for the sum of RM36,000. On 17 October 2001, in accordance with the terms and conditions of the SPA, the plaintiff was issued a notice of termination of the SPA to the defendant. On 2 February 2002, the defendant in his letter to the plaintiff conveyed his desire to continue with the purchase of the land and agreed to make payment of the differential sum of RM12,000 with the balance to be settled through a loan from a financial institution. However, the defendant neglected to meet his obligations resulting in the plaintiff issuing a second notice of termination on 18 March 2002. On 31 March 2002, the plaintiff learned that the defendant had entered a private caveat on the land. Hence this application by the plaintiff, to remove the defendant's private caveat and for damages to be

assessed for wrongful entry of the caveat. It was the plaintiff's contention that the defendant had no caveatable interest on the land. The defendant in his affidavit had submitted that he had not neglected to pay the progress payment but that he had withheld the progress payment because the plaintiff had acted in breach of cl 12 of the SPA. The court had directed the parties to submit on the principles as stated in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (*Luggage Distributors*).

Held, allowing the application with costs:

(1) According to the law on caveats, the caveat entered by the defendant ought to be removed unless he can show that there were sufficient grounds in fact and law for its continuance. The approach adopted by the Court of Appeal in *Luggage Distributors*, was that in determining whether the caveat should remain or be removed it was necessary to scrutinise the reasons at three stages. The first stage required looking at the Form 19B, which the caveator was required to file when entering a caveat, and study the reasons stated therein for imposing the caveat in order to conclude whether it disclosed a caveatable interest. If it did not disclose any caveatable interest then there was no need to proceed any further, because then it was clear that the caveat ought to be removed (see paras 17 & 22).

(2) In the instant case, the defendant disclosed in his Form 19B that he was a person claiming title to the land. In addition, the Form 19B was accompanied by a statutory declaration that the defendant had paid RM16,000 to the plaintiff for the purchase of the land and house with reference made to the SPA. Therefore, the defendant as a purchaser prima facie fell within the definition of a person claiming title to the land and as such he belonged to the class of persons who may lodge a caveat under s 323(1) of the National Land Code (see paras 23–25).

(3) It was therefore necessary to consider the second stage in *Luggage Distributors* which arises when an aggrieved person applies to remove the caveat. In such a case, the court had to examine the affidavit evidence to see if it supported the caveatable interest claimed in Form 19B or whether it showed that the claim raised a serious issue to be tried. On the facts, it was clear that the plaintiff had been adversely affected by the existence of the caveat on the land (see para 26–28).

(4) Clause 12 of the SPA did not provide the defendant the right to withhold or refuse to make payment if the construction of the house on the land had involved the use of material and workmanship which did

not conform to the description. Instead, cl 12 provided the defendant with the safeguard of claiming against the plaintiff if the house was not constructed according to the plans approved by the appropriate authority. The plaintiff had complied with cl 4(2) of the Third Schedule by serving the notice of claim for progress payment supported by a certificate signed by the plaintiff's architect as proof that the works therein had been completed. However, the defendant as the purchaser had breached cl 9(1)(a), (b) and (c) of the SPA by his failure to pay the sums payable within the time stipulated. Therefore, the plaintiff had the right to annul the sale and forthwith terminate the SPA as the evidence adduced did not either support the claim to a caveatable interest or support the fact that there was a serious issue to be tried (see paras 32–35).

(5) As the defendant had failed to pass the second stage of the three stages mentioned in *Luggage Distributors*, there was no need to proceed to the third stage (see para 39).

[Bahasa Malaysia summary

Pada Mac 2001, defendan/pembeli memasuki satu perjanjian jual beli (PJB) untuk membeli tanah yang dipegang di bawah HS(D) 470 /1985, Plot 468, Mukim Mergong, Kedah, bersama-sama dengan rumah yang dibina di atasnya (tanah tersebut) daripada plaintif/penjual. Menurut PJB, harga belian untuk tanah tersebut ialah RM80,000 tertakluk kepada terma-terma dan syarat-syarat yang dinyatakan di dalamnya. Defendan membayar kepada plaintif RM16,000 sebagai sebahagian bayaran harga belian dan memperoleh pinjaman kewangan untuk membayar baki harga belian. Walau bagaimanapun, pinjaman kewangan dari bank hanya untuk jumlah sebanyak RM52,000, meninggalkan baki sebanyak RM12,000, iaitu perbezaan di antara harga belian dan jumlah pinjaman. Tambahan, menurut Jadual Ketiga PJB mengenai pinjaman, defendan perlu membayar jumlah sebanyak RM12,000 kepada plaintif sebelum bank melepaskan jumlah pinjaman sebanyak RM52,000. Walaupun beberapa peringatan diberikan, defendan gagal membuat bayaran berperingkat. Defendan juga gagal menyelesaikan jumlah RM12,000 walaupun menerima notis untuk menyelesaikannya. Pada 26 September 2001, plaintif menghantar kepada defendan notis tuntutan untuk jumlah sebanyak RM36,000. Pada 17 Oktober 2001, dengan menurut terma-terma dan syarat-syarat PJB tersebut, plaintif mengeluarkan notis pembatalan PJB kepada defendan. Pada 2 Februari 2002, defendan di dalam suratnya kepada plaintif menyampaikan hasratnya untuk meneruskan dengan pembelian tanah tersebut dan bersetuju untuk membuat bayaran jumlah

perbezaan RM12,000 dengan baki yang akan diselesaikan melalui pinjaman daripada sebuah institusi kewangan. Walau bagaimanapun, defendan gagal menyempurnakan kewajipannya yang mengakibatkan kepada plaintif mengeluarkan notis pembatalan kedua PJB tersebut pada 18 Mac 2002. Pada 31 Mac 2002, plaintif mendapat tahu bahawa defendan telah memasukkan kaveat persendirian di atas tanah tersebut. Maka permohonan ini oleh plaintif, untuk membatalkan kaveat persendirian defendan dan untuk gantirugi ditaksir bagi kemasukan kaveat yang salah. Ia adalah hujahan plaintif bahawa defendan tidak mempunyai kepentingan yang boleh kaveat atas tanah tersebut. Defendan di dalam afidavitnya menghujah bahawa dia bukan gagal untuk membayar bayaran berperingkat tetapi telah menahan bayaran berperingkat tersebut kerana plaintif telah bertindak dengan memungkiri klausa 12 PJB. Mahkamah mengarahkan untuk menghujah atas prinsip-prinsip seperti yang dinyatakan di dalam kes *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (*Luggage Distributors*).

Diputuskan, membenarkan permohonan dengan kos:

(1) Menurut undang-undang terhadap kaveat, kaveat yang dimasukkan oleh defendan mesti dibatalkan kecuali dia boleh menunjukkan bahawa terdapat alasan yang mencukupi dalam fakta dan undang-undang untuk penyambungannya. Pendekatan yang diambil oleh Mahkamah Rayuan di dalam kes *Luggage Distributors*, adalah bahawa, dalam memutuskan sama ada kaveat harus dikekalkan atau dibatalkan, adalah perlu untuk meneliti alasan-alasan tersebut dalam tiga peringkat. Peringkat pertama memerlukan pemeriksaan Borang 19B, yang mana pengkaveat perlu failkan apabila memasukkan kaveat, dan mengkaji alasan-alasan yang dinyatakan di dalamnya untuk memasukkan kaveat, untuk memutuskan sama ada ia mendedahkan kepentingan yang boleh kaveat. Jika ia tidak mendedahkan kepentingan yang boleh kaveat, maka tidak perlu untuk meneruskan lagi, kerana ia jelas bahawa kaveat tersebut mesti dibatalkan (lihat perenggan 17 & 22).

(2) Di dalam kes ini, defendan telah mendedahkan di dalam Borang 19Bnya bahawa beliau adalah seorang yang menuntut hakmilik kepada tanah tersebut. Tambahan, Borang 19B disertakan bersama dengan akuan berkanun bahawa defendan telah membayar RM16,000 kepada plaintif untuk harga belian tanah dan rumah dengan rujukan dibuat kepada PJB tersebut. Oleh itu, defendan sebagai pembeli, prima facie termasuk dalam definisi orang yang menuntut hakmilik terhadap tanah dan oleh yang demikian dia termasuk ke dalam kelas orang-orang yang boleh memasukkan kaveat di bawah s 323(1) Kanun Tanah Negara (lihat perenggan 23–25).

(3) Oleh itu adalah perlu untuk mempertimbangkan peringkat kedua di dalam kes *Luggage Distributor* yang berbangkit apabila orang yang terkilan memohon untuk membatalkan kaveat. Di dalam kes yang sedemikian, mahkamah perlu memeriksa keterangan afidavit untuk melihat sama ada ia menyokong kepentingan yang boleh kaveat yang dituntut di dalam Borang 19B atau sama ada ia menunjukkan bahawa tuntutan tersebut membangkitkan isu serius yang perlu dibicarakan. Di atas fakta, jelas bahawa plaintif telah terjejas dengan buruk oleh kewujudan kaveat atas tanah tersebut (lihat perenggan 26–28).

(4) Klausa 12 PJB tidak memperuntukkan kepada defendan hak untuk menahan atau menolak daripada membuat pembayaran jika pembinaan rumah di atas tanah tersebut melibatkan penggunaan material dan tenaga kerja yang tidak menurut deskrispi. Sebaliknya, klausa 12 memperuntukkan kepada defendan perlindungan untuk menuntut terhadap plaintif jika rumah tersebut tidak dibina menurut pelan yang diluluskan oleh pihak berkuasa yang sepatutnya. Plaintif telah mematuhi klausa 4(2) Jadual Ketiga dengan menyerahkan notis tuntutan bayaran berperingkat yang disokong oleh sijil yang ditandatangani oleh arkitek plaintif sebagai bukti bahawa kerja-kerja dinyatakan telah diselesaikan. Walau bagaimanapun, defendan sebagai pembeli telah memungkiri klausa 9(1)(a), (b), dan (c) PJB atas kegagalannya membayar jumlah yang perlu di bayar dalam masa yang diperuntukkan. Oleh itu, plaintif mempunyai hak untuk membatalkan jualan dan dengan serta-merta membatalkan PJB kerana keterangan yang dikemukakan tidak menyokong tuntutan untuk kepentingan yang boleh kaveat atau menyokong fakta bahawa terdapat isu serius untuk dibicarakan (lihat perenggan 32–35).

(5) Oleh kerana defendan telah gagal untuk melepasi peringkat kedua daripada tiga peringkat yang dinyatakan di dalam kes *Luggage Distributors*, tidak perlu untuk meneruskan ke peringkat ketiga (lihat perenggan 39).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

Cases referred to

Eng Mee Yong v Letchumanan [1979] 2 MLJ 212 (refd)

Jasalam (M) Sdn Bhd v Wong Koon Yee [2000] 3 MLJ 115 (refd)

Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (distd)
Nanyang Development [1966] Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113 (refd)
Wu Shu Chen & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 3 CLJ 854 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Regulations 1989 r 11(1), Schedule G
National Land Code ss 326, 327, Form 19B

Badrul Kamal bin Md Salleh (Abdul Halim Said & Co) for the plaintif.
C Megalai (Meg Nacha Zahir & Co) for the defendant.

Mohd Sofian J:

[1] This is the plaintiff's application ('encl 1') dated the 23 February 2006 under s 327 of the National Land Code 1965 ('the NLC') to remove the defendant's private caveat (No Perserahan 2445/2002) restraining the registration of dealings on the register document of title relating to land held under HS(D) 470/1985, Plot 468, Mukim Mergong, Daerah Kota Setar, Kedah Darul Aman ('as the said land') and also for damages to be assessed for wrongful entry of caveat.

FACTUAL MATRIX OF THE CASE

[2] On 21 March 2000, the plaintiff entered into a sale and purchase agreement to purchase the said land together with the house erected thereon ('the SPA') exhibited as P1. The purchase price for the said land together with the house erected thereon was the sum of RM80,000 subject to the terms and conditions as stipulated therein.

[3] The defendant had paid the plaintiff the sum of RM16,000 as part payment of the purchase price and this fact is not denied by the plaintiff. The balance purchase price to be paid by the defendant is the sum of RM64,000.

[4] The defendant had obtained end-financing to pay for the balance purchase price from Bank Kerjasama Rakyat Bhd, Mergong, Alor Star for the sum of RM52,000. A balance of RM12,000 being the difference between the purchase price and the loan amount. The defendant has to pay the said sum of RM12,000 to the plaintiff before the bank could release the loan amount of RM52,000 in accordance with the third schedule of the SPA on installment payments.

A **[5]** The defendant as the purchaser had not make progress payment to the plaintiff as the vendor despite several reminders sent to the defendant, pursuant to cl 4 of exh PL. Copies of the reminder requesting for payments are collectively exhibited by the plaintiff and marked as exh P2. The defendant had also failed to settle the difference between the purchase price
B and the loan amount. Notices requesting the defendant to make the payment of the differential sum were sent and collectively marked as exh P3. The defendant despite being notified of the same, had failed to make payment. On or about the 26 September 2001, the plaintiff had sent to the defendant a notice of claim for progress payment at 65% completion for the sum of
C RM52,000 less the amount paid of RM16,000, and the balance payable to the plaintiff for the sum of RM36,000. On 17 October 2001 in accordance to the terms and conditions of the SPA (exh P1) the plaintiff had caused to be issued a notice of termination of the sale and purchase agreement (exh P1) to the defendant and marked as exh P4.

D

[6] The defendant by letter dated 2 February 2002 to the plaintiff had stated the desire to continue with the purchase of the said land by agreeing to make payment of the differential sum of RM12,000. The balance of RM52,000 would be settled through loan from a financial institution. The
E said letter from the defendant is marked as exh P5. The defendant despite its promise to settle the differential sum of RM12,000 had wilfully and/or neglected to make the said payment, resulting in the plaintiff issuing a second notice of termination of the SPA dated 18 March 2002 which is marked as exh P6.

F

[7] On the 31 March 2002 the plaintiff was informed that the defendant had caused to be entered a private caveat on the said land vide Perserahan No 2445/2002 (hereinafter called the said caveat). Notice of the entry of the private caveat is exhibited as P7. The plaintiff maintained that the defendant
G has no caveatable interest on the said land.

[8] The defendant's affidavit in reply affirmed on 6 August 2006 stated the following namely.

H

[9] That to settle the balance purchase price, the defendant had applied for end financing from the Bank Kerjasama Malaysia Bhd, Mergong branch (hereinafter called the bank). A copy of the letter of approval of loan from the bank is exhibited as AN 3. The defendant averred that the letter of approval
I of loan did not mean that he could not pay the differential sum. The

defendant denied that he had wilfully and/or neglected to make the progress payment. He had withheld the progress payment because the plaintiff had breached cl 12 of the SPA.

[10] The defendant further stated that on or about the month of September 2000, the construction of the said house was not in accordance with the Fourth Schedule of the SPA. This was based on the report made by the consultant engineers, Messrs Perunding Jadi. The defendant also alleged that there were differences between the signature of architect Zahimi Zaiton Ibrahim on the certificate of progress payment for 20% and 35%. The defendant admitted receiving the notices dated 17 October 2001 and 18 March 2002 respectively.

[11] The plaintiff had filed an affidavit in reply affirmed on 19 September 2006 to rebut the defendant's affidavit filed on 26 August 2006. The court adjourned the matter for hearing to 6 December 2006.

[12] On 6 December 2006 when the matter came up for hearing the court was informed that the defendant had filed another affidavit in reply affirmed on 4 December 2006 but was not served on the plaintiff. The learned counsel for the plaintiff urged the court not to consider the defendant's affidavit in reply as it was not served on the plaintiff.

[13] The court after hearing submissions by learned counsels for both the plaintiff and the defendant ruled that the court would not consider the defendant's affidavit in reply affirmed on 4 December 2006 due to the late filing and non-service on the plaintiff's solicitors.

[14] The court after perusing the written submissions filed by the plaintiff and hearing oral submissions by learned counsels for both parties, adjourned the matter for decision to 26 February 2007.

[15] On 26 February 2007, the court directed learned counsel for both parties to submit on the principles as stated in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and adjourned the matter for decision to 28 March 2007, whereby the court allowed the plaintiff's application (encl 1) with costs.

[16] The defendant who was dissatisfied with the said decision has since filed a notice of appeal. Appended herewith are the reasons for the said decision.

A THE LAW ON CAVEAT

[17] The caveat entered would be removed, unless the defendant could show that there are sufficient grounds in fact and law for its continuance. Lord Diplock in *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212, at p 215 thus expressed that the onus is upon the caveator in an application for the removal of a caveat.

B

> This is the nature of the onus that lies upon the caveator in an application by the caveator under s 327 for removal of a caveat, he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

C

D

[18] Azmi LP in *Nanyang Development [1966] Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 explained the burden of the caveator as follows:

> In my view he has not only to state his grounds but to substantiate them before the learned judge. Do not think it is the intention of the law that when a person enters a private caveat against a land he would not be required to prove that he has a good reason in law for doing that and that it should be on the part of the proprietor to satisfy the court that the caveator has not got good grounds for entering the private caveat.

E

F

[19] The burden on the caveator is the same burden as imposed in an application for the extension of caveat under s 326 of the NLC, (see the case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212).

G

[20] The principles as stated in the case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212) are followed in many other cases as follows:

(a) *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263;

H

(b) *Jasalam (M) Sdn Bhd v Wong Koon Yee* [2000] 3 MLJ 115;

(c) *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng*.

[21] In the case of *Jasalam (M) Sdn Bhd* the brief facts are that the appellant was the purchaser for the whole land vide sale and purchase agreement dated 5 November 1996. The respondent, who caveated the said land was at all material times the purchaser of a small portion of the same land vide sale and purchase agreement dated 22 January 1973 but did not take any action to register its share of the land in the document of title. The respondent only

I

entered a caveat on the said land on 21 January 1997 and thereafter filed an application for specific performance in July 1998. The Court of Appeal set aside the caveat on the grounds, inter alia, that the respondent's claim did not raise any serious issues to be tried.

[22] The approach adopted by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd* in determining whether the caveat entered should remain or removed is to scrutinise the reasons at three stages namely:

> First, the court is to examine the caveat itself, that is, to look into Form 19B and the reasons stated therein for imposing the caveat. If no caveatable interest has been shown, the caveat ought to be removed without the need to consider the remaining two stages. If Form 19B shows a caveatable interest, the court then moves on to the second stage. The second stage is when an aggrieved party applies to remove the caveat. The court then examines the affidavit evidence of the caveator to find out if the evidence supports the caveatable interest claimed in the Form 19B or shows that the claim to a caveatable interest raises a serious issue to be tried. The court is to examine the evidence in detail and closely. If the evidence does not support the claim to a caveatable interest or that there is a serious issue to be tried on this point, the court is to remove the caveat without going to the third stage. Once the first two stages are satisfied, then the court must decide as a third stage, where the balance of convenience lies. It must be noted that at the second stage the caveator is not allowed to justify the retention of the caveat on a ground different from that set out in his Form 19B and the court is required to subject the caveator's affidavit evidence in support of the caveatable interest to 'meticulous scrutiny' (see *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437). In *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest.
>
> In *Wu Shu Chen*, the caveat was removed because the caveator had merely stated in the Form 19B that they had a caveatable interest 'by virtue of certain document' which they did not exhibit. Mokhtar Sidin JCA said at p 503:
>
> > As can be seen in the said para 2 above, Goh had not disclosed what that so-called 'certain document' was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be.

[23] In the instant case, the Form 19B (application for Entry of a Private Caveat) was accompanied by the following grounds verified by a statutory declaration of the defendant.

SURAT AKUAN

Saya, Abd Naeeim bin Hj Tarmiji (KP: A0075003, KP Baru 650501-08-5925) beralamat di F34, Depan Sek Keb Jalan Baru, 34200 Parit Buntar, Perak, dengan sesungguhnya dan sucihati mengaku bahawa:

1. Saya telah membayar RM16,000 keatas tanah dan rumah HS(D) 470/1985, Plot 468, Mukim Mergong. Rujuk kepada perjanjian jual beli yang ditandatangan pada 21 Mac 2000.

Dan bahawasanya saya mengaku akuan ini dengan sesungguhnya dan sucihati bahawa kandungannya adalah benar dan mengikut peruntukan-peruntukan Akta Akuan Berkanun 1960.

Diperbuat dan diakui dengan)

sesungguhnya dan sebenarnya)

oleh Abd. Naeeim B. Hj Tarmiji) T.t.

pada 27 Mac 2002)

Di Alor Setar, Kedah Darulaman)

T.t.

Nama: Abdul Talib bin Yaacob No: K046

Pesuruhjaya Sumpah Malaysia

No 13, Tingkat 1, Bangunan PAS Kedah

Jalan Kota, 05050 Alor Star

Kedah Darul Aman

[24] The stated ground for the application for entry of the caveat was that the defendant had paid RM16,000 to the plaintiff for the purchase of the said land and house and reference was made to the sale and purchase agreement dated 21 March 2000. An agreement of sale was not disclosed in the Form 19B but it was mentioned in the defendant's affidavit in reply affirmed on 6 August 2006.

FINDINGS OF THE COURT

[25] The court is of the view that the defendant as a purchaser, prime facie fell within the definition of a person claming title to the land and at whose instance a private caveat may be entered under s 323 of the NLC. On the issue of the classes of persons who may lodge private caveat, I can do no better than to quote in extenso a passage by Hashim Yeop A Sani (later CJ Malaya) in the case of *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 at p 116 as follows:

Thus it is plain that the appellant claim to have the right to lodge the caveat but based on cl 4(a) of the deed of assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of s 323 of the National Land Code. Interest which are protectable by caveat are only interests recognised by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title or interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land. See also David Wong, *Land Tenure in the Malay States* at pp 416–435.

[26] In this regard, the defendant has cleared the first stage and the court now considers the remaining two stages. The second is where the plaintiff as the aggrieved person has applied to remove the caveat. The term 'aggrieved person' under s 327 of the NLC is never defined. In the case of *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 at p 499, the court held that the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved person is never closed.

[27] Upon perusing the documents annexed to encl 1, I have no doubt that plaintiff is indeed adversely affected by the existence of the caveat on the land.

[28] In this respect, the court has to examine the affidavit evidence of the defendant to find out if the evidence supports the caveatable interest claimed in the Form 19B or whether it shows that the claim to a caveatable interest raises a serious issue to be tried.

[29] The affidavit evidence of the defendant shows that the relationship which governs both the plaintiff and the defendant was the SPA dated 21 March 2000 based on the standard sale and purchase agreement (Land and Building) Housing Developers (Control and Licensing) Regulations 1989 (Regulation 11(1) Schedule G). The said sale and purchase agreement provides for the mode for claiming progress payment, which is found in cl 4 under schedule of payments.

Clause 4(1) provides that the purchase price shall be paid by the purchase to the vendor by instalments and at the time and in the manner as prescribed in the Third Schedule hereto.

Clause 4(2) provides that 'Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate signed by the vendor's architect or engineer in charge of the housing development and every such certificate so signed shall be proof of the fact that the works therein referred to have been completed.

Clause 9 further states as follows:

9 Default by Purchaser and determination of agreement

(1) If the Purchaser —

(a) fails to pay any installment payable under cl 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under cl 8; or

(b) fails to pay any sum or sums payable under this agreement within the time stipulated for payment; or

(c) commits any breach of the terms or conditions contained in this agreement or fails to perform or observe all or any of the Purchaser's covenants herein contained; or

(d) before payment in full of the purchase price of the said property, commits an act of bankruptcy or enters into any composition or arrangement with his creditors or, being a company, enters into liquidation, whether compulsory or voluntary.

the vendor may, subject to sub-clause (2) hereof, annul the sale of the said property and forthwith terminate this agreement and in such an event —

(i) the Vendor shall be entitled to deal with or otherwise dispose of the said Property in such manner as the Vendor shall see fit as if this Agreement had not been entered into;

(ii) the installments previously paid by the Purchaser to the Vendors, excluding any interest paid, shall be dealt with and disposed of as follows:

(a) firstly, all interest calculated in accordance with clause 8 hereof owing and unpaid shall be paid to the Vendor;

(b) secondly, a sum equal to ten per centum (10%) of the purchase price thereof shall be forfeited to the Vendor; and

(c) lastly, the residue thereof shall be refunded to the Purchaser.

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

(iv) each party hereto shall pay its own costs in the matter.

(2) If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid installments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by AR Registered post to treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid installments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

Clause 12

The said building shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule hereto and in accordance with plans approved by the Appropriate Authority as in the Second Schedule, which description and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the appropriate authority. The Purchaser shall not be liable for the cost of such changes or deviations and in the even that the changes or deviations involve the substitution or use of cheaper materials or the omission of works originally agreed to be carried out by the Vendor the Purchaser shall be entitled to a corresponding reduction in the purchase price herein or to damages in respect thereof.

[30] The court is of the considered opinion that cl 4(1) and (2) of the SPA stipulate the obligation on the part of the defendant to make progress payment upon receipt of the request for payment supported by a certificate signed by the plaintiff's architect or engineer as proof of the fact that the works therein referred to have been completed.

[31] The defendant admitted receiving the said notices but had refused to make payment on the basis that the plaintiff had breached cl 12 of the SPA.

[32] In this regard, the court is of the view that cl 12 of the SPA does not provide that the defendant is entitled to withhold or refuse making any payment if the construction of the said house had used material and workmanship which does not conform to description. In cl 12 itself there is safeguard to the defendant in that if the house was not constructed according to the plans approved by the appropriate authority, any costs for such changes or deviations shall be borne by the plaintiff. In any event this can only come about when the vacant possession had been handed over to the defendant and it is still within the 18 months defect liability period as stated in cl 23 of the SPA.

[33] Based on the above stated facts, the court held that the plaintiff had complied with cl 4(2) of the Third Schedule by serving the notice of claim for progress payment supported by a certificate signed by the plaintiff's architect as proof that the works therein referred have been completed.

[34] The court also held that the defendant as purchaser had breached cl 9(1)(a)(b) and (c) of the SPA.

[35] The court opined that once the defendant as purchaser had breached cl 9(1)(a)(b) and (c) of the SPA, plaintiff as vendor may subject to sub cl 2 annul the sale of the said property 23 (land) and forthwith terminate the SPA to which the plaintiff did. Under cl 9(1)(i) once the SPA had been terminated, the plaintiff as vendor shall be entitled to deal with or otherwise dispose of the said property (land) in such manner as the plaintiff shall see fit as if this SPA had not been entered into.

[36] It is for these reasons that the court is of the view that the evidence adduce does not support the claim to a caveatable interest or that there is a serious issue to be tried or any action pending in any court.

[37] In *Murugappa Chettiar Lakshmanan* the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest. In the instant case, the defendant as caveator has failed to show an enforceable contract to have a caveatable interest.

[38] Applying the above stated principles to the instant case, the court held that the defendant has failed to pass the second stage of the three stages mentioned in *Luggage Distributors (M) Sdn Bhd*. The court will not proceed

to the third stage to consider where the balance of convenience lies.

CONCLUSION

[39] For the reasons aforesaid, I allowed the plaintiff's application in encl 1 with costs.

Application allowed with costs.

Reported by K Nesan